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IN THE
Supreme Court of the United States

IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001

FEDERAL INSURANCE COMPANY *et al.*,
Petitioners,

v.

KINGDOM OF SAUDI ARABIA *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTRODUCTION

Respondents address the bulk of their four briefs to the sufficiency of petitioners' complaints, the potential outcome of this case in lower courts if this Court were to rule in favor of petitioners, and, quite defensively, the Saudis' role in the war on terror. What they barely address are the reasoning, scope, and implications of the Second Circuit's decision. That decision acknowledges a circuit split on an important issue of FSIA immunity—recently deepened by a Fourth Circuit decision in conflict with the Second Circuit and important enough that the United States has repeatedly opposed the construction the Second Circuit adopted.[1] The decision below also sharply limits the normal operation of state tort law, heretofore preserved by FSIA § 1605(a)(5), when terrorists strike in the United States—in conflict with decisions of the Ninth Circuit and other courts. And, in contrast to other courts of appeals, the Second Circuit has placed a constitutional limit on federal court jurisdiction over claims against donors to terrorist organizations, and has uniquely required a showing that donors directed terrorist attacks against U.S. citizens or specifically intended funds to be used for such attacks.

ARGUMENT

A. FSIA "State" Immunity

1. In *Yousuf* v. *Samantar*, --- F.3d ---, 2009 WL 40942 (4th Cir. Jan. 8, 2009), the Fourth Circuit

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[1] Pet. 17-20. The U.S. stated recently that it "disagrees with the position adopted in [this case by the Second Circuit] that the FSIA applies to foreign officials." Reply to 28(j) Letter at 2, *Matar* v. *Dichter*, No. 07-2579-cv (2d Cir., filed Oct. 29, 2008).

confirmed and further deepened the split among the circuits over FSIA's application to foreign officials. It canvassed the circuit split and then followed the Seventh Circuit's "especially persuasive" interpretation of FSIA in *Enaharo* v. *Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005). *Yousef*, 2009 WL 40942, at *6-8. The Fourth Circuit considered and rejected the reasoning of the Second Circuit in this case and the Ninth Circuit in *Chuidian* v. *Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), concluding instead "that the FSIA does not apply to individual foreign government agents." 2009 WL 40942, at *7-9.

The Fourth Circuit's decision confirms the mistake in respondents' half-hearted suggestion that it is "far from clear" that the Second Circuit's decision is in "genuine conflict" with the Seventh Circuit. Turki Br. 16-17; Sultan Br. 14-16. The Second Circuit *acknowledged* its conflict with the Seventh Circuit. Pet. App. 15a. The Seventh Circuit has likewise acknowledged that its approach conflicts with *Chuidian*, *Enaharo*, 408 F.3d at 882, as has the United States, Pet. App. 293a-294a; *supra* n.1. And all for good reason: *Enaharo* addressed immunity for "official conduct" undertaken as "a public official," and rejected the construction of FSIA that the Second Circuit adopts. *Enaharo*, 408 F.3d at 880-81. Even if *Enaharo* were not enough, *Ye* v. *Zemin*, 383 F.3d 620, 625 (7th Cir. 2004), employed like reasoning to conclude that FSIA does not apply to individuals, there a head of state.

The Fourth Circuit's decision also underscores the error in respondents' claim that the conflict regarding 28 U.S.C. § 1603 is somehow blunted by Congress' recent passage of 28 U.S.C. § 1605A. Turki Br. 18-19; Sultan Br. 15-16. That latter provision does not purport to amend FSIA's definition of "state" or

modify § 1603 in any manner. Instead, the provisions respondents address simply provide, in § 1605A(a)(1), that acts of certain "officials" may be attributed to the state (as FSIA always has provided, see 28 U.S.C. § 1605(a)(5)) and, in § 1605A(c), that victims of state sponsored terrorism may pursue a new federal cause of action and recover a broad range of damages (reversing an earlier, contrary decision). If § 1605A has any relevance for construing § 1603, it supports the Seventh and Fourth Circuits' approach by sharply distinguishing between "states" and "officials," which would be superfluous if the Second Circuit's construction were correct. See *id.* § 1605A(c) ("a foreign state shall be vicariously liable for the actions of its officials").

2. Respondents mistakenly contend that common law immunity somehow undermines the importance of the question presented or makes § 1603 irrelevant to the ultimate disposition of this case.

Respondents' claim that the question lacks importance assumes that the Second Circuit's decision had no effect on common law immunity for officials, Turki Br. 19-20; Sultan Br. 17, but that is clearly wrong. While the Second Circuit did not "need [to] consider" common law immunity in light of its FSIA holding, Pet. App. 18a, it expressly addressed the open issue of "'whether the FSIA was meant to supplant the "common law,"'" and acknowledged that the *Chuidian* analysis it adopted displaced common law immunity. *Id.* at 13a, 18a-19a (quoting *Tachiona* v. *United States*, 386 F.3d 205, 220 (2d Cir. 2004)). Respondents' view that the common law survives the Second Circuit's decision as an alternative basis for immunity is inconsistent with Congress' careful crafting of exceptions to immunity in § 1605(a)-(g) and established law that interprets

FSIA as uniformly regulating "state" immunity. See, *e.g.*, *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 488-49 (1983). The United States' arguments addressing the "*Chuidian*[ ] approach['s] troubling practical consequences" and "problematic implications" rest on the understanding that that approach displaces common law immunity. Pet. App. 295a, 255a; see Pet. 17-20.[2]

Nor would rejecting the Second Circuit's reasoning, and acknowledging the relevance of common law immunity, be immaterial to the outcome of this case. Respondents would have this Court assume that they are protected by common law immunity. See Turki Br. 21-22, 25-26; Sultan Br. 20-21, 23-24. No court below has addressed this issue. Common law immunity likely does not apply, based on the claims of terrorism at issue and the role that certain respondents played in directing non-traditional agents (*i.e.*, extraterritorial "charities") as part of their official service. Nor has the U.S. determined whether immunity should exist in this case or whether it wishes to shield officials from liability related to the September 11th attacks. In any event, these issues would be addressed in proceedings following this Court's decision, and prejudging them provides no basis for declining to address important issues that divide the courts of appeals.

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[2] Because respondents understate the implications of the Second Circuit's decision for the continued applicability of common law immunity (and ignore *Chuidian* on this point), they sidestep the considerable tension that exists between the approach of the Second and Ninth Circuits to senior officials' immunity and the approach of the Seventh and Eleventh Circuits. See Pet. 19-20; Pet. App. 294a (U.S. view that the *Chuidian* approach is "precisely backwards" and inconsistent with other decisions).

B. FSIA's Noncommercial Tort Exception.

Respondents' arguments concerning the noncommercial tort exception assume that §§ 1605(a)(5) and 1605A cannot both address terrorism-related harm: that construing § 1605(a)(5) to support terrorism-related claims would permit plaintiffs to "plead around" the limitations of § 1605A, rendering that provision a "dead letter" and eliminating any "'need for plaintiffs ever to rely on [§ 1605A] when filing suit.'" Kingdom Br. 19, 22; Sultan Br. 25. This ignores two fundamental aspects of FSIA. First, Congress initially limited § 1605(a)(5) to torts causing injury in the United States and then, in response to a series of extraterritorial terrorist attacks, *extended* FSIA liability against state sponsors of terrorism for harm caused to U.S. interests anywhere in the world. See Pet. 23-24. Congress preserved the scope of § 1605(a)(5) and contemplated that §§ 1605(a)(5) and 1605A might overlap to some degree when it indicated that § 1605A applies only "in any case not otherwise covered by this chapter." 28 U.S.C. § 1605A(a). By extending relief for terrorism victims abroad, Congress clearly did not limit relief for acts of terrorism undertaken *in the United States.*

Against this backdrop, a conflict clearly exists between the Second and Ninth Circuits. The Ninth Circuit held that § 1605(a)(5) supports claims by victims of state-sponsored extrajudicial killings undertaken in the United States. See *Liu* v. *Republic of China*, 892 F.2d 1419, 1424-25 (9th Cir. 1989); see also *Letelier* v. *Republic of Chile*, 488 F. Supp. 665, 672-73 (D.D.C. 1980); 28 U.S.C. § 1605A(a)(1) ("extrajudicial killing" is an act of terrorism). The Second Circuit acknowledged that § 1605(a)(5) is written in broad terms and that acts of terrorism are "[b]y definition" torts, Pet. App. 27a, 31a, but held

that § 1605(a)(5) precludes recovery for acts also encompassed by § 1605A. Pet. 22-23. *Letelier* and *Liu* were decided before Congress *extended* relief available to terrorism victims, see *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 88, 90 (D.C. Cir. 2002), but § 1605A provides no basis to believe that the Ninth Circuit would abandon its construction of § 1605(a)(5) or that *Liu* would be decided differently today. See *Flatow* v. *Islamic Republic of Iran*, 999 F. Supp. 1, 15 (D.D.C. 1998) (continued vitality of *Liu* and *Letelier*); *Doe* v. *bin Laden*, 580 F. Supp. 2d 93, 97 (D.D.C. 2008).

Respondents' arguments also remove any doubt that the question presented for review is significant. Respondents confirm that the Second Circuit's decision must be read to provide what Congress could not possibly have intended §§ 1605(a)(7) and 1605A to accomplish: to bar terrorism victims from recovering for tortious acts of terrorism committed in the United States except in the most limited circumstances and to scale back sharply the normal operation of states' tort law to redress that harm, a power preserved by § 1605(a)(5). See Kingdom Br. 14-15, 20-21; Sultan Br. 25. Under the Second Circuit's reading, § 1605A transfers states' police power to the State Department, which through designations of state sponsors of terrorism would determine which tortfeasors could be subject to suit. See Kingdom Br. 14. This unwarranted constriction of states' ability to redress harm caused by acts of terrorism undertaken on their soil alone justifies this Court's review.

Respondents also argue that this case is a poor vehicle to address the question presented because the complaint alleges extraterritorial acts beyond the scope of § 1605(a)(5), which addresses injuries in the

U.S. and has been construed by some lower courts as requiring that the underlying tort be committed in the U.S. See Kingdom Br. 19-20. This conclusion was not, of course, the basis for the Second Circuit's decision. And, even if the likelihood of plaintiffs' eventual success were relevant now, plaintiffs are likely to prevail.

This case is quite unlike, for example, *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984), where plaintiffs alleged emotional injury incurred in the U.S. based on a tort committed in Iran, or *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984), where officials in Mexico failed to compensate certain U.S. landholders. Here, the 19 hijackers who boarded planes in Boston, New Jersey and Washington, D.C. and then crashed those planes in New York, Virginia, and Pennsylvania clearly committed a tort within the United States, and § 1605(a)(5) readily encompasses conspiracy and aiding and abetting claims that attribute liability for that tort to persons who may act abroad. See *Doe*, 580 F. Supp. 2d at 98-99 (and cases cited); *Olsen* v. *Gov't of Mexico*, 729 F.2d 641, 646 (9th Cir. 1984), *abrogated on other grounds*, *Joseph* v. *Office of Consulate Gen. of Nigeria*, 830 F.2d 1018 (9th Cir. 1987).[3]

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[3] Respondents also claim that this case is a poor vehicle because petitioners would not ultimately satisfy the "discretionary function" exception to § 1605(a)(5). This issue, too, was not the basis for the Second Circuit's decision. It is also startling that respondents would embrace a theory that posits that facilitating the September 11th attacks was a conscious policy of the Saudi government and of a type that Congress intended to immunize.

C. Personal Jurisdiction.

Respondents seek to sidestep the Second Circuit's obvious misapplication of this Court's personal jurisdiction decisions, and the conflict among the courts of appeals, by understating the scope and rationale of the decision below. Respondents repeatedly claim that the alleged tie between them and the United States was simply that they "made personal donations to foreign charities that in turn made payments to al Qaeda," Turki Br. 27, 29, or that they made "donations to charitable organizations, knowing that the charities would divert funds to al Qaeda." Sultan Br. 29.[4] In fact, the Second Circuit held that no personal jurisdiction existed even assuming that respondents "kn[ew] that their money would be diverted to al Qaeda," were "aware of Osama bin Laden's public announcements of jihad against the United States and al Qaeda's attacks on the African embassies and the U.S.S. Cole," and "could and did foresee that recipients of their

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[4] Respondents generally mischaracterize the record in significant respects that will be addressed should the petition be granted. They also inaccurately contend that the complaints' allegations are insufficient, while ignoring the Second Circuit's determination that the complaints include "a wealth of detail." Pet. App. 5a. In any event, the sufficiency of the allegations was not a basis for and is irrelevant to the Second Circuit's decision.

Prince Mohamed similarly errs in claiming that petitioners' personal jurisdiction arguments do not apply to him. He is the chairman of and a principal investor in a banking conglomerate that facilitated funding for al Qaeda, and he knowingly and materially supported those actions. *See* Burnett Pls.' Third Amended Compl. ¶¶ 97-102, 364-366; WTC Props. Pls.' Compl. ¶¶ 700-702; Pet. App. 44a-45a. Petitioners challenge the Second Circuit's conclusion that personal jurisdiction was lacking over *all* the princes because they did not "direct[ ]" or "command[ ]" the September 11th attacks. Pet. App. 41a-45a.

donations would attack targets in the United States." Pet. App. 43a-44a. What was lacking, according to the Second Circuit, was an allegation that respondents "directed the September 11 attacks or commanded an agent (or authorized al Qaeda) to commit them." *Id.* at 42a.

Against this backdrop, it is a perverse application of this Court's decisions to conclude that respondents should not "reasonably anticipate being haled into court" in the United States, *World Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980), or that they did not "'purposefully direct[ ]' [their] activities at residents of the [United States]." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472-73 (1985). In light of the Second Circuit's assumptions, the split between the courts of appeals is apparent. The Second Circuit construed *Calder* v. *Jones*, 465 U.S. 783 (1984), to require that respondents "'expressly aimed' intentional tortious acts at residents of the United States." Pet. App. 44a. By contrast, the Seventh, Ninth, and D.C. Circuits have found that requirement met where, as here, defendants undertook action that they reasonably knew would harm citizens of the judicial forum. See Pet. 28-30 (citing cases).

Boim v. *Holy Land Foundation*, 549 F.3d 685 (7th Cir. 2008) (en banc), underscores the circuit split between the Seventh and Second Circuits and the threat that the Second Circuit's decision poses to the enforcement of U.S. counterterrorism law. While the *en banc* court had no occasion to address the Due Process Clause directly, it defined what intentional conduct suffices for establishing when a defendant's wrongful donations to terrorist groups are directed at U.S. citizens—the linchpin of the Second Circuit's due process analysis.

Boim involved a suit against donors to Hamas under 18 U.S.C. § 2333, which allows damages for harm caused by acts of international terrorism and was one of petitioners' claims dismissed by the Second Circuit. Donors to Hamas were liable for the death of a U.S.-Israeli citizen living in Israel because "[the victim] was a natural target for Hamas," and because donating to Hamas amounted to "intentional misconduct" directed at its victims when the donor "either knows that the organization engages in such acts or is deliberately indifferent to whether it does or not." *Boim*, 549 F.3d at 691, 693. "Giving money to Hamas, like giving a loaded gun to a child"—even without "desire [that] the child ... shoot anyone"—satisfies the intentionality requirement not only for criminal statutes such as 18 U.S.C. § 2339A, but also for the tort standards associated with § 2333. *Id.* at 690, 693.

Boim thus confirms that, in the Seventh Circuit, donation to a terrorist organization known to target U.S. citizens amounts to the intentional direction of harm against them; the Second Circuit's holding in this case is precisely to the contrary. *Boim* removes any doubt that the Seventh Circuit would apply *Janmark, Inc.* v. *Reidy*, 132 F.3d 1200 (7th Cir. 1997), to uphold petitioners' claims, and particularly their § 2333 claim, in direct conflict with the Second Circuit's dismissal of the claims. *Boim* also confirms that the civil and criminal counterterrorism statutes, including §§ 2333 and 2339A-C, extend to overseas contributions to organizations that commit acts of terrorism in a broad range of circumstances that the Second Circuit has now held are beyond the jurisdiction of U.S. courts.

Respondents have no substantive response to the Second Circuit decision's effect on U.S. counter-

terrorism laws other than to dismiss the concern as speculative. Turki Br. 32-33; Sultan Br. 31-32; Mohamed Br. 14-15. *Boim* shows this to be false. And each day, relying on far less direct ties between supporters of terrorism and the United States than the Second Circuit required, the U.S. Government enforces financial restrictions and the criminal and civil laws directed against provision of material support to terrorists, see Pet. 31-32, without establishing that targets of those enforcement actions "directed ... attacks or commanded an agent ... to commit them," as the Second Circuit required. Pet. App. 42a. Already, terrorists and their supporters are challenging these enforcement efforts on due process grounds. See *United States* v. *Al Kassar*, 582 F. Supp. 2d 488 (S.D.N.Y. 2008). The Second Circuit's decision will buttress their claims, which is reason enough for this Court's review.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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